# Plaintiffs' Memorandum in Opposition to Joint Motion for Summary Judgment for Failure to Prove Fault Element of Public Nuisance Claims

# Ex 26 – Prevoznik Tr. (5-17-19) Excerpts

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

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| IN RE: NATIONAL PRESCRIPTION OPIATE LITIGATION | ) | MDL No. 2804 |
| | ) | Case No. 1:17-MD-2804 |
| THIS DOCUMENT RELATES TO ALL CASES | ) | Hon. Dan A. Polster |

FRIDAY, MAY 17, 2019

HIGHLY CONFIDENTIAL - SUBJECT TO FURTHER CONFIDENTIALITY REVIEW

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Videotaped deposition of Thomas Prevoznik, Volume III, held at the offices of WILLIAMS & CONNOLLY LLP, 725 Twelfth Street, NW, Washington, DC, commencing at 8:10 a.m., on the above date, before Carrie A. Campbell, Registered Diplomate Reporter and Certified Realtime Reporter.

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EXAMINATION (continued)

QUESTIONS BY MR. FARRELL:

Q. Good morning.

A. Good morning.

Q. Welcome back to day three of your deposition, Mr. Prevoznik.

I'll remind you or let me ask you to recall that today you'll be testifying on behalf of the United States Drug Enforcement Administration, the DEA, on subject matters that have been requested in this litigation.

Continuing the line of discussion, I'm going to -- I have marked, premarked, and am showing you Plaintiff's Exhibit 17, and the first thing I'd like to do is I'd like to direct your attention to the bottom right-hand corner.

And you see the numbers US-DEA-00025656?

A. Yes, I do.

Q. I'll represent to you that's a Bate stamp number provided by the Department of Justice. And what I wanted to do was to lay a little foundation on the documents that

QUESTIONS BY MR. FARRELL:

Q. Now, the next one is McKesson, and we're going to take a real quick stop to take a look at this one.

This is dated -- the first one is December 6, 2005, and it appears to be a conference call with Mr. John Gilbert.

Do you see that?

A. Yes.

Q. And Mr. Mapes and Kyle Wright of the DEA.

Who are Mr. Mapes and Mr. Wright of the DEA?

A. Mr. Mapes was the section chief of our E-Commerce section, and Kyle Wright at this time was a staff coordinator in Mr. Mapes' section.

Q. So the next plaintiff's exhibit has the Bates stamp at the bottom corner of US-DEA-00000371, and you'll see that it's dated January 23, 2006, but it's referencing a January 3, 2006 meeting.

Do you see that?

A. Yes.

Q. And in it you can see where it

looks like it contains -- this is the memorandum of the meeting between McKesson and the DEA as a result of the distributor initiative. Agreed?

MR. EPPICH: Object to form and foundation.

THE WITNESS: Yes.

QUESTIONS BY MR. FARRELL:

Q. Now, what I'm going to ask you to do is I'm going to ask you to go to the end of page 2. And at the bottom, starting with the word "after," the very last paragraph, I'd ask you to read that into the record.

A. "After the conclusion of this meeting, it was learned from Gary Hilliard of McKesson Corp that one of the reasons they were not able to realize the full volume of hydrocodone product going out to the Florida pharmacies was that their reports only included the name brand hydrocodone products distributed and was leaving out the generic products."

Q. The next sentence.

A. "It was only after realizing

that the generic were not being reported was McKesson Corp then able to see the large quantities that DEA was bringing to McKesson's attention."

Q. So I don't know how to say this any other way, but in 2006 when the DEA met with McKesson with its distributor initiative program, was it discovered that McKesson was only tracking the brand name prescription opiates?

MR. EPPICH: Object to form. Foundation. Calls for speculation. Scope.

THE WITNESS: Could you please repeat it?

QUESTIONS BY MR. FARRELL:

Q. This document, following the distributor initiative meeting between the DEA and McKesson, appears to present the fact that the DEA discovered McKesson was only tracking brand name prescription opiates.

A. Correct.

MR. EPPICH: Object to the form. Foundation. Calls for speculation.

THE WITNESS: Correct.

QUESTIONS BY MR. FARRELL:

Q. If, in fact, McKesson was only tracking brand name prescription opiates and leaving out the generic products, is that a violation of federal law?

MR. EPPICH: Object to form. Foundation. Calls for speculation. Calls for a legal conclusion.

THE WITNESS: Yes.

QUESTIONS BY MR. FARRELL:

Q. Sitting here today as the custodian of ARCOS and the institutional knowledge of the Drug Enforcement Administration, if this is true, how many generic prescription orders do you estimate that McKesson missed prior to 2005?

MR. EPPICH: Object to the form. Calls for speculation. Calls for a legal conclusion, and I believe it would be outside the Touhy authorization.

MS. MAINIGI: Join.

MR. FINKELSTEIN: Scope. Calls for speculation.

You can answer in your personal capacity, but not on behalf of the DEA.

THE WITNESS: I have no idea.

QUESTIONS BY MR. FARRELL:

Q. A lot?

MR. EPPICH: Same objections.

MR. FINKELSTEIN: Same objection.

THE WITNESS: Yes.

QUESTIONS BY MR. FARRELL:

Q. All right. On a scale of 0 of 10 of screw-ups, how big of a screw-up is this?

MR. EPPICH: Object to form. Argumentative.

MR. FINKELSTEIN: Same objection.

You can answer in your personal capacity, but not on behalf of the DEA.

THE WITNESS: In my personal capacity, a big one, a really big one.

QUESTIONS BY MR. FARRELL:

Q. Epic?

A. Yes.

MR. EPPICH: Same objections.

(Prevoznik Plaintiff's Exhibit P26 marked for identification.)

QUESTIONS BY MR. FARRELL:

Q. We're now going to jump ahead a little bit. I'm going to show you what's next marked as Plaintiff's 26.

This is a series of letters that the DEA, institutionally and with perfect recollection, will recall that -- between the lawyers for Cardinal Health and the DEA, the first time they got in trouble for breaking the law in 2008.

MS. MAINIGI: Objection.

Scope. Foundation. Form.

QUESTIONS BY MR. FARRELL:

Q. Now, without having to go through all of the nuances, what I'm going to ask you to do is I'm going to make a reference now. At the bottom right-hand corner is Bates stamp CAH_MDL2804_01376799.

Do you see that? 799 are the last three numbers.

A. Yes, I have it.

Foundation. Calls for speculation.

THE WITNESS: Yes.

QUESTIONS BY MS. SINGER:

Q. "Apparently the DEA soon realized that the largest distributors were not taking their compliance requirements with sufficient seriousness. In 2007 and 2008, the DEA took enforcement action through legal settlements against the three largest wholesale distributors in the US for alleged violations of the CSA, with multi-million dollar fines involving two of them."

Is that also accurate?

MR. EPPICH: Object to form.

MS. MAINIGI: Objection to form.

THE WITNESS: Yes.

QUESTIONS BY MS. SINGER:

Q. Last paragraph. "Despite these settlement agreements and the subsequent policy enhancements that the three distributors made in their aftermath, the committee found that the distributors continued to ship large volumes of opioids into West Virginia. The three largest

wholesale drug distributors in the United States - AmerisourceBergen, Cardinal Health and McKesson - sent more than 900 million doses of hydrocodone and oxycodone to West Virginia between 2005 and 2016. Cardinal Health was the largest supplier of controlled substances to West Virginia out of the five companies examined as part of the Committee's investigation, and distributed more than 366 million doses of hydrocodone and oxycodone to West Virginia pharmacies between 2005 and 2016. From April 2006 through 2016, McKesson supplied 299.87 million doses of hydrocodone and oxycodone to West Virginia pharmacies, AmerisourceBergen distributed 248.16 million doses of hydrocodone and oxycodone to West Virginia pharmacies between 2005 and 2016."

Is that also consistent with DEA's understanding of what had occurred?

MR. EPPICH: Object to the form. Foundation.

THE WITNESS: Yes.

QUESTIONS BY MS. SINGER:

Q. Turn the page, please. "Among the Committee's findings, distributors

suffered a series of breakdowns or had a lack of follow-through in their -- through in their due diligence evaluations of prospective pharmacy customers. As demonstrated in the report, the committee found instances of insufficient due diligence by distributors who merely required pharmacies to complete new customer applications."

Now, we talked about that earlier, correct?

MR. EPPICH: Object to the form.

THE WITNESS: Correct.

QUESTIONS BY MS. SINGER:

Q. And that is not sufficient to comply with the registrant's obligation to know their customers, correct?

MR. EPPICH: Object to the form. Foundation.

MS. MAINIGI: Calls for a legal conclusion.

THE WITNESS: Correct.

QUESTIONS BY MS. SINGER:

Q. "There were cases where data

submitted by a new customer was not critically analyzed to identify any red flags of controlled substance diversion, for example, potential red flags regarding a pharmacy's prescribing physicians that raised concerns about possible diversion were not questioned."

Is that consistent with DEA's understanding of what occurred?

MR. EPPICH: Object to form. Foundation.

THE WITNESS: Yes.

QUESTIONS BY MS. SINGER:

Q. Goes on to say, "The investigation found instances where there were failures to monitor the volume of controlled substances sold to customers. Some distributors used thresholds to track customers' purchases of controlled substances and flag orders as suspicious when purchases exceeded those limits. But some of these thresholds were assigned arbitrarily and not effective. Committee found instances in which distributors set thresholds but failed to enforce them, assigned artificially high

hydrocodone threshold limits with little to no documented justification, or continued to raise threshold levels without thoroughly investigating or documenting the justifications presented by a customer pharmacy."

Again, is that what DEA observed happened during this time period?

MR. EPPICH: Object to the form. Foundation. Calls for speculation.

MS. MAINIGI: Join.

THE WITNESS: Yes.

QUESTIONS BY MS. SINGER:

Q. Okay. And is that failure to flag suspicious orders, to approve them without justification and to continue to raise thresholds, a violation of the Controlled Substances Act?

MS. MAINIGI: Objection. Calls for a legal conclusion. Outside the scope.

MR. EPPICH: Objection to the form.

MR. FINKELSTEIN: Object to

form.

THE WITNESS: Yes.

QUESTIONS BY MS. SINGER:

Q. It goes on, "Despite efforts by DEA to educate distributors about their responsibility to report suspicious orders, the companies reviewed by the committee failed to address suspicious orders" -- I'm sorry -- "suspicious order monitoring in critical ways. Rather than reporting individual suspicious orders as they were identified, some distributors reported a variety of other types of information to DEA over the years. This information included excessive orders encompassing drug shipments that had already been shipped and suspicious customers such as pharmacies with which distributors had terminated business relationships. Neither of these types of reports informed DEA about suspicious orders in realtime, nor did they guarantee the suspicious orders reported to DEA were also blocked by the distributors. The committee also found that one distributor lacked any formal order monitoring program. Rather, the

distributor's employees relied on subjective criteria to investigate {sic} orders it considered suspicious."

Does that also reflect what the DEA knew to happen during this time period?

MS. MAINIGI: Objection. Form. Foundation. Outside scope.

MR. FINKELSTEIN: Object to the form.

THE WITNESS: Yes.

QUESTIONS BY MS. SINGER:

Q. And the last paragraph. "Another critical failure identified by the Committee involved instances in which distributors appeared to turn a blind eye to red flags of possible drug diversion. Despite available information, distributors at times took only minimal steps to investigate possible warning signs of diversion and continued to ship controlled substances to suspect pharmacies. In several cases, distributors either failed to fully investigate potentially troubling information they obtained from customer pharmacies or willfully ignored it. These failures raise

substantial concern given that DEA has said existing knowledge of a geographic area's problem with controlled substance abuse is a factor that distributors should take into account when evaluating customers."

Now, is that true, that DEA had said knowledge of a geographic area's problem with controlled substance abuse is a factor that should be taken into account by registrants?

MR. EPPICH: Object to the form.

MS. MAINIGI: Object to form.

THE WITNESS: Yes.

QUESTIONS BY MS. SINGER:

Q. Okay. "West Virginia has the highest drug overdose rate in the country, meaning distributors should have been particularly attuned to any red flags encountered when conducting due diligence on pharmacies in that state."

Is that also an accurate reflection of a registrant's duty when shipping controlled substances into West Virginia or other hotspots?

MR. EPPICH: Object to form.
Calls for a legal conclusion.
MS. MAINIGI: Outside the scope.
THE WITNESS: Yes.
QUESTIONS BY MS. SINGER:
Q. Okay. And this whole paragraph that I just read, does that also reflect the DEA's understanding of what happened during this time period?
MR. EPPICH: Object to the form. Vague. Calls for a legal conclusion.
MR. FINKELSTEIN: Join in the form objection.
THE WITNESS: Yes.
QUESTIONS BY MS. SINGER:
Q. Okay. Turn to page 10, please. Bottom of page 10 there's a bullet that says, "For due process reasons, it is current DEA practice not to inform distributors or other registrants about customers that may have engaged in improper behavior."
Do you see where I am?
A. The bottom?